Santa Clara High Technology Law Journal

Volume 19 | Issue 2 Article 2

January 2003

International Intellectual Property, Progress, and the Rule of Law

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INTERNATIONAL INTELLECTUAL PROPERTY, PROGRESS, AND THE RULE OF LAW

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I. INTRODUCTION: DEVELOPMENT OF INTELLECTUAL PROPERTY

Intellectual property is in part commercial law, comparable to laws that concern the negotiability of instruments, banking, security interests, or the interpretation of contracts. National commercial law can be contrasted with laws that prohibit dangerous or antisocial conduct, like murder, environmental pollution, or civil rights. The same contrast exists in international law. Intellectual property and other commercial treaties facilitate economic activity. Human rights treaties, environmental treaties, and the laws of war seek to impose basic norms for protection of humanity and our world.

Intellectual property rights grant monopoly control over certain practices to the "owner" of certain classes of rights.[1] The function of a patent law, for instance, is to prevent anyone but the owner from using or profiting from a given process.[2] The function of a trademark

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† The author is a Professor of Law at Santa Clara University Law School. This article was originally prepared as a discussion paper for the Swedish International Symposium on Economics, Law and Intellectual Property in Göteborg, Sweden, in June 2000. The symposium was sponsored by the Swedish Royal Academy of Science and Chalmers University. This article is also planned for publication as a book chapter by the symposium director, Professor Ove Granstrand.

The author wishes to acknowledge the great help of the Journal Editors, especially Ms. Maki Kanayama, who provided excellent corrections in the editing process and Ms. Jennifer Hayes, who put the footnotes into shape.

1. Importantly, the owner typically possesses these rights, rather than the developer or the innovator. As such, intellectual property laws often deny claims by the originator of a new process while also frequently disregarding whether the current owner has contributed any innovative activity to society.

2. "Process" is a comprehensive term that embraces the scope of patent laws. For example, United States law allows patents for "a new and useful process, machines, manufacture, or composition of matter." 35 U.S.C. § 101 (2000). The term "process" actually includes its fellow categories by virtue of the definition of "process" in 35 U.S.C. § 100 (2000): "The term 'process' means process, art or method, and includes a new use of a known process machine, manufacture, composition of matter or material." The code is intended to allow patents inclusive of "anything under the sun that is made by man." S. Rep. No. 82-1979 at 5 (1952); H.R. Rep. No. 82-1923 at 6 (1952). *See also* Diamond v. Chakrabarty, 447 U.S. 303

is to provide exclusive control over identifying marks so that others may not use them at all. In general, intellectual property divides into two main branches. One branch protects the variety of inventive works through doctrines such as patents and copyrights. The other protects the identification of goods and the "goodwill" value associated with that identification or branding.[3]

The history of intellectual property laws manifests a balance between freedom to trade items and creation of limited monopoly rights. In England, concern with the free flow of goods traces back to the Magna Carta in 1215, which provided:

> All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us.[4]

That charter and its language emphasize the antimonopoly nature of commercial laws. Individuals and groups should remain free to practice their professions and trades without domination by others.

The creation of specific intellectual property laws, including patents and copyrights, occurred some four centuries later. The first of these laws, the Statute of Monopolies [hereinafter Statute], was created as a specific reaction against monopoly powers exercised by certain individuals and entities.[5] The operation of English law and royal practices had granted monopolies to various importers and producers.[6] For instance, Queen Elizabeth's court favorite, Lord Darcy, appeared to have been granted a monopoly over importing and selling playing cards in England.[7] "When Mr. Darcy attempted to enforce his monopoly against a new entrant, his monopoly was found

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(1980).

3. *See* HOWARD C. ANAWALT & ELIZABETH ENAYATI POWERS, IP STRATEGY—COMPLETE INTELLECTUAL PROPERTY PLANNING, ACCESS, AND PROTECTION, (West Group 2001) § 1.01, at 1-3.

4. A.E. DICK HOWARD, MAGNA CARTA TEXT AND COMMENTARY (University of Virginia, 1964) (quoting the Magna Carta at para. 41), *available at* http://www.fordham.edu /halsall/source/mcarta.html (version prepared by Paul Halsall) (1996); *see also* Jeffrey A. Smith, *It's Your Move-No It's Not! The Application of Patent Law to Sports Moves*, 70 U. OF. COLO. L. REV. 1051, 1055 (1999).

5. Richard C. Wilder, *Letters to the Editor: Playing Cards in the Hashemite Kingdome of Jordan*, 2 U. OF BALT. INTELL. PROP. L.J. 237, 238 (1994).

6. *See id.*

7. *Id.*

to be illegal at common law. . . Darcy's Case signaled the beginning of the end of the Monopoly System."[8] As abuses mounted, Parliament was compelled to take action, and in 1628 enacted the Statute of Monopolies.[9] The Statute declared void all monopolies, commissions, grants, licenses, charters, and letters patent "for the sole buying selling making working or using of any thing within this Realm or the dominion of Wales."[10] The Statute created an exception allowing the creation of a short term monopoly (fourteen years) "to the true and first inventor and inventors" of new processes.[11]

About a century later, the Statute of Anne granted qualified protection to the printing monopoly of the royally chartered Stationers' Company against "pirates," that is, those who would have the temerity to print materials on their own.[12] That Statute set up the first copyright regime, granting authors a fourteen year monopoly term, which might be renewed for a second fourteen year term.[13] The Statute of Anne also contained a consumer protection provision that allowed relief against a printer or bookseller who might sell a book "at such a Price or Rate as shall be Conceived by any Person or Persons to be too High and Unreasonable. . . ."[14]

As the markets of the world have become closely-knit, harmonized commercial law, including intellectual property rules, offers commercial advantages. Businesses can plan better, and they can expect the same laws to prevail in most places. On the other hand, nations may differ on the objectives they wish to achieve through intellectual property. Treaties creating internationally guaranteed intellectual property can have major impacts on national legal cultures and practices.[15]

International intellectual property law has grown up on the basis of individual national choice. For example, the Paris Convention

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8. *Id.* at 237.

9. *Id.*

10. *Id.*

11. Wilder, *supra* note 5, at 237.

12. *See* ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 1, (4th ed., 1993) (reproducing and discussing the Statute of Anne, 8 Anne c. 19 (1710)).

13. *Id.* at 2.

14. *Id.*

15. Treaties establish obligations between or among the states that enter into them. Usually the treaty itself does not provide the rule of decision in a given controversy between private parties. The law of the nation must be changed to incorporate the rules. Whether the treaty will create private rights depends on the intention expressed in the treaty and upon the expressed legislative will of the nation having jurisdiction over the particular piece of private litigation. *See* ANAWALT & POWERS, *supra* note 3, § 1.03 [17], at 1-173–74.

covering "industrial property" [hereinafter Convention] requires that each nation grant foreign nationals the same treatment/protection of industrial property that they grant to their own nationals.[16] Under the Convention, "industrial property" includes patents, utility models, industrial designs, trademarks, and indications of source such as regional production.[17] The Convention grants to union members the reservation that member states may grant compulsory licenses to patents to prevent patent abuse.[18] The Convention preserves national independence with regard to procedural aspects. "The provisions of the laws of each of the countries of the Union relating to judicial and administrative procedure are expressly reserved."[19]

The Berne Convention on copyrights [hereinafter Berne] also obligates its member nations to accord similar protection to foreign works as they do to ones protected directly by their laws. Berne also requires certain minimum standards of copyright protection concerning the broad categories of copyrightable works.[20] It goes into detail with regard to the kinds of works protected and the substance of the protection. However, as with the Paris Convention, the Berne Convention leaves the means of enforcement entirely to the national laws.[21] It states that "apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."[22] Berne does provide for one mandatory procedure, the seizure of infringing copies; however, that remedy shall "take place in accordance with the legislation of

16. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, art. 2(1), *available at* http://www.wipo.int/clea/docs/en/wo/wo020en/htm. "Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention." *Id.* Such reciprocal treatment is referred to generally as comity. *See id.*

17. *See id.* at art. 1(2).

18. *Id.* at art. 5(a)(2). "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work." *Id.* The legal professions are accustomed to breaking law into two halves—substance and procedure. This is comparable to the distinction between content and form. "Substantive" refers to the *content* of a right or duty. "Procedure" refers to *how* the substantive law is carried into effect.

19. *Id.* at art. 2(1).

20. Berne Convention for the Protection of Literary and Artistic Works, Jul. 24, 1971, art. 5(2), T.I.A.S. 1184, *available at* http://www.wipo.org (last visited Feb. 13, 2003).

21. *See generally id.*

22. *Id.* at art. 5(2).

each country."[23]

II. WTO/TRIPS

In 1995, the World Trade Organization (WTO) was established[24] and by 2001 the WTO had 134 member countries. Membership in the WTO has become a practical necessity for international trade today. TRIPS is a mandatory part of the WTO system.[25] The Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS] reaffirms the principle that nations must provide the same degree of protection of intellectual property for foreigners as it does for its own nationals.[26] However, the primary thrust of TRIPS is to mandate the content of intellectual property laws and to require particular enforcement mechanisms.[27] A salient feature of TRIPS is that comprehensive intellectual property right obligations are linked to membership in the worldwide trade system. TRIPS is part of a more general movement to standardize both the substance and procedure of intellectual property rights on a worldwide basis.[28] This movement represents a departure from the predominant approach prior to its enactment, namely, to leave substance and procedure primarily up to the various nations.

The scope of mandatory intellectual property rights includes copyrights, trademarks, geographical indications, industrial designs, patents, integrated circuit layouts, and trade secrets. The TRIPS preamble states that "intellectual property rights are private rights."[29] The agreement requires substantive laws and procedures to enforce these private rights. These requirements are unprecedented both in their detail and in their demand to the commitment of national legal

23. *Id.* at art. 16(3).

24. The WTO is the successor to General Agreement on Tariffs and Trade (GATT). "The World Trade Organization came into being in 1995. One of the youngest of the international organizations, the WTO is the successor to the General Agreement on Tariffs and Trade (GATT) established in the wake of the Second World War." World Trade Organization, *What is the WTO?*, *available at* http://www.wto.org/wto (last visited Feb. 10, 2003). The WTO's membership is 145 countries (as of February 2003).

25. Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS], Apr. 15, 1994, *available at* http://www.wto.org/wto/intellec/1-ipcon.htm (last visited Feb. 13, 2003); Marrakesh Agrement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, *available at* http://www2.law.cornell.edu/. The North American Free Trade Agreement (NAFTA) slightly predates TRIPS and contains many similar provisions. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 612.

26. *Id.* at art. 1.

27. The enforcement or procedural requirements are set forth in Part III. *Id.* at art. 41-61.

28. *See generally id.*

29. *Id.* at pmbl.

resources.

TRIPS requires that all member nations give effect to its provisions.[30] The treaty states that members are free to determine the appropriate method of implementing its provisions.[31] Yet the context of the treaty and the economic force of the trade system combine to force member nations to be thorough in implementing these obligations. Furthermore, the law of treaties binds nations to fulfill their obligations in good faith, and denies that a nation may "invoke the provisions of its internal law as justification for its failure to perform a treaty."[32] The following are several examples of the substantive and procedural requirements propounded under the TRIPS agreement.

A. Substantive law[33]

TRIPS established broad categories of obligatory protection for intellectual property. In addition to these broad mandates, it created specific obligations, sometimes in excruciating detail. This switch from general to specific is seen by comparing the overarching requirement under TRIPS that member nations provide basic protections of copyrights, patents, and other forms of intellectual property with the specific protection prescribed for computer software.

In particular, TRIPS provides that "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application."[34] It also requires that "computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention."[35] With regards to computer programs, TRIPS asserts that member nations "shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works."[36]

These requirements dictate a very specific approach to the

30. TRIPS, *supra* note 25, at art. 1

31. *Id.* at art. 1, 3(1).

32. Vienna Convention on Treaties, May 23, 1969, art. 26–27, T.I.A.S. No. 11931.

33. "Substantive law" refers to the content or subject matter of laws. *See* BLACK'S LAW DICTIONARY 1429 (6th ed. 1990). For example, the substantive law of patents defines what a patent right is and in a general sense how it is acquired.

34. TRIPS, *supra* note 25, art. 27(1).

35. *Id.* at art. 10(1).

36. *Id.* at art. 11.

protection of software. Legal control of software presents a deeply controversial subject matter. Computer programs lie on a boundary between information and function. A piece of software is in one sense pure information, like the word "twenty," or a communication, like the greeting, "hello." At the very same time the data, "twenty" or "hello," in a computer program may control an operation in the same way that wheels and gears control a machine. Data in software constitutes information and function at the very same time.[37]

Legal control of software presents perplexing problems for courts and legislatures. For example, what monopoly control should be granted to works whose function depends on the configuration and use of information? Monopolies in this area allow control of information and business practices, matters which the law has traditionally sought to assure will be free for use by all. The example set by the United States, protecting computer programs by copyright and by patent, has presented some of the most sensitive and difficult issues ever to arise in this context. Many commentators have criticized these computer copyright and patent rules, and United States federal courts have wrestled with the problems for decades.[38]

TRIPS requires its members to provide trade secret protection as well. Protection of trade secrets was not previously covered in multilateral treaties. "The TRIPS agreement explicitly requires that 'undisclosed information' benefit from protection."[39] Identification of what should be considered a "trade secret" presents a very difficult problem for courts. Sorting out who deserves control over particular ideas is very difficult to do. Far more often than not, the claim of one party to a right to control a "secret" is counterbalanced by some other valid concern, such as freedom to engage in a business practice or profession.[40] Equally often, trade secret claims are simply over-exaggerated. Consequently, it takes a very large commitment of legal resources to resolve trade secret cases. TRIPS also contains specific requirements with regard to trademarks and protections for labeling of regional goods, "where a given quality, reputation or other

37. *See generally* ANAWALT & POWERS, *supra* note. 3.

38. ANAWALT & POWERS, *supra* note 3, at § 1.03 [1], [8], and [10] (there may now be hundreds of articles on the problems raised by technological copyright). *See also* Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308 (1994) (one of the most comprehensive critiques).

39. Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT'L L. & POL'Y 769, 788–89. *See also* TRIPS, *supra* note 25, at art. 39.

40. *See generally id.* at 785.

characteristic of the good is essentially attributable to its geographical origin."[41]

B. Procedure

TRIPS requires member nations to create comprehensive and detailed enforcement mechanisms. Procedural requirements cut even more deeply into national legal systems than substantive requirements because they dictate how a nation's courts and administrative bodies shall behave.[42] Courts and administrative agencies are extremely expensive for all but the wealthiest of nations. The following is survey of selected articles appearing in the enforcement section of TRIPS:

> • Article 41 establishes a general obligation to ensure enforcement provisions are available to "permit effective action against any act of infringement of intellectual property rights."[43] The Article also states that these "procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade. . ."[44] This insists that trade, not innovation or advancement of public interest is the primary purpose for enforcing intellectual property rights.[45]
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> • Article 43 dictates a specific result regarding the availability of evidence.[46] If a party who controls evidence fails to produce it, then judicial authorities shall have the power to order that such evidence be produced. Such a provision can be appropriate, but why is it that intellectual property cases should be singled out for this particular treatment? Such a preference may constrain a nation that wishes to give priority to cases involving domestic violence or

41. TRIPS, *supra* note 25, at art. 15–33.

42. *See generally id.* at Part III.

43. Other provisions include damages and attorneys fees destruction of items, and abuse of process. *See* TRIPS, *supra* note 25, at art. 45, 46, 48.

44. *Id.* at art. 41(1).

45. It should be noted that by contrast, the development of intellectual property rights at the national level has usually been based on its advancement of the broader interests of the public.

46. TRIPS, *supra* note 25, at art. 43.

environmental pollution.

- Article 44 provides that nations give their courts authority "to order a party to desist from infringement."[47] Such a remedy is available in many industrialized countries, but the administration of such jurisdiction is both expensive and tends to favor the party who makes the intellectual property claim, whether that claim is strong or weak. TRIPS does not insist on an equivalent right that would assist the defending party. For example, nothing assures that a defendant will have the right to challenge the scope or validity of a copyrights or patent claim.[48]

- Article 50 requires powerful "provisional measures."[49] These measures grant intellectual property right claimants powerful remedies before a trial is actually held.[50] In practice in the United States, such preliminary orders often become in effect the final orders that decide the case. This is because provisional orders create heavy obstacles in the path of a defending party's attempts to raise money, hire employees, and continue to market products. These obstacles exist for all parties, including those who raise strong and valid defenses. Provisional orders favor intellectual property monopoly claims over claims of access or freedom to engage in trade and industry. This is especially true in cases where the intellectual property claimant has ample ability to spend money in court and the defendant does not.

III. TRIPS' Relation to National Legal Culture

Intellectual property protection can provide value to commerce, to innovation, and to the society at large. However, when intellectual

47. TRIPS, *supra* note 25, at art. 44(1).

48. *Id.* One might contrast the broad scope of a right claimant's protections with the skimpy protection of a defendant in a patent case. Section 34 allows a very crabbed defense to one accused of infringing a process patent: the accused infringer must rebut a presumption in favor of the patent claimant when the claim shows that it was substantially likely that the product was obtained by use of the patent and the claimant has "been unable through reasonable efforts to determine the process actually used." *Id.* at art. 34(1)(b).

49. *Id.* at art. 50.

50. *See generally id.*

property claims receive too much protection or become viewed as ends in themselves, they erode the public interest. Overprotection also undermines the interests of traders and industry. As has been noted, the first English intellectual property laws, the patent laws, emerged as an exception to a general condemnation of monopoly power.[51] As a general rule, "intellectual property laws stand as exceptions to major legal policies favoring free exchange of ideas and freedom to compete."[52] The historical perspective of intellectual property favors moderate degrees of protection that fit into national legal structures.

A balanced approach to intellectual property protection should facilitate innovation, assure wide dissemination of advances, and allow cultures to continue their individual development. The approach currently pursued under the WTO/TRIPS presents three major problem areas related to the achievement of these goals. These concern property, legal resources, and innovation.

Let us begin with a few starting observations. First, the peoples of the world need progress under what is generally referred to as a rule of law. The world and its cultures need to substitute a widespread use of reasoned authority for the sheer use of force. Second, the value of a stable legal order is best realized when the culture assimilates the notion of law. Law becomes a reality when the culture accepts it. Finally, economic theories and practices constitute means, not ends in themselves. One cannot choose what is good or valuable based on economic considerations standing alone. These major premises color the analysis that follows.

A. Property

Property constitutes a means of exercising power. Claiming things such as "my coffee cup" or "my home" does not impose much interference on others. Assertions of ownership over methods of producing coffee cups or over large tracks of land however, do control other people. Property rights cut deeply into how communities and cultures structure themselves. Thus, one needs to ask: Who shall define property rights and their limits? Shall people who live outside our culture decide them, or shall we?

Professor Francis Philbrick made the following useful observations about property. First, property is a legal concept which

51. *See* Wilder, *supra* note 5.

52. ANAWALT & ENAYATI, *supra* note 3, at §1.01.

is constantly subject to change. "It is self-evident that neither the things recognized as the object of property rights nor the nature of these rights themselves could possibly be the same under a land economy of 1700 and our industrial economy of today."[53] Philbrick's second major point is that social conditions create the meaning of property as a legal institution.[54]

Intellectual property rights represent particularly forceful forms of social power. These rights grant control over valuable processes or expressions and deny others the capacity to use them unless the owner's consent is obtained, or unless some legal privilege of use is established that grants access. From its preamble forward, TRIPS insists that intellectual property of a whole range of substance and form must be treated not only as property, but as "private property rights."[55]

Private property is not the only form of property. A range of other property options exist. If nations are constrained by trade considerations, they may be foreclosed from useful choices of how to handle the "property" aspect of intellectual creations. These options include:

- Private property. This form of property means that a person, group, or entity, such as a corporation, owns the property. Examples include owning a car, a piece of land, or a patent. The private property options can include distinctions between corporate ownership and ownership of human beings or associations.

- Community property. This is a form of property in which a community, rather than an individual or a group of separate persons owns the property. Examples include kibbutzim and the

53. Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 691 (1937). In the same immediate context, Philbrick observes that intellectual property should be recognized as property "on Locke-ian principles, since it is a product of labor (and of genius). . ." *Id.* at 692. The 1930s inspired some careful legal scholarship in the United States on the nature of property as a legal institution. At that time the nation was experiencing the enormous impact of a great depression. The administration of President Franklin D. Roosevelt was pressing ahead with programs intended to remedy the economic ills that led to this collapse. The administration considered remedies that would cut into expectations that had firm legal groundings in two of the most deeply ingrained areas of American law, contracts and property. *Id.*

54. *Id.* at 696.

55. *See generally* TRIPS, *supra* note 25.

civil law institution of familial community property.

• Public property. In this form of property, a political entity owns the property. Examples include public parks, roads, military facilities, and such things as government owned patents or copyrights. These examples demonstrate the fallacy of conflating all property rights into a category of "private rights" as the WTO/TRIPS agreement does.[56]

Since the United States has promoted the obligatory standards of TRIPS, it should be noted that the U.S. Constitution steps very cautiously into the arena of intellectual property. The Constitution does not provide for a federal definition of property rights, but leaves this to the constituent States of the Union. This is true, even though the Constitution, unlike a treaty, created a government responsive to its people.

The U.S. Constitution does provide that the federal government may create patents and copyrights, if Congress decides to do so,[57] but that clause does not grant any rights itself. Nor does the Constitution oblige the constituent States to create such protection in the absence of an act of Congress. It simply grants to the federal legislature the power to act. The rights created by Congress must be limited in duration.[58] Once granted, due process (a separate constitutional norm) protects particular items of intellectual property, e. g., a patent already granted, from governmental taking without compensation.[59]

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56. *See* BLACK'S LAW DICTIONARY (6th ed. 1990).

57. U.S. CONST. art. I, § 1, cl. 8.

58. The Patent and Copyright clause contains only a grant of power to the national legislature. U.S. CONST. art. I, § 8, cl. 8. Congress is not obliged to create any patent or copyright laws. The clause speaks of creating "exclusive rights" for inventors and writers, but since Congress need not create any rights, there appears to be no reason that it may not condition the rights heavily. *Id.* For example, copyright ownership under the modern U. S. copyright law specifically allows others to use the copyrighted material when the use is "fair use." 17 U.S.C. § 107 (2000). American constitutional scholars often disagree over every assertion made about the United States Constitution. At the risk of sparking such a dispute among American colleagues, I note that this is the only occasion in the Constitution that deals with the creation of a property right. Creation of property rights was apparently viewed as entirely beyond the scope of the central (federal) government. The institutions of property are left to the States that comprise the nation. An example of divergence among the states is community property discussed in the text. Several western states provide for spousal community property, a continental European system. Under community property, all earnings and resulting property acquired during the marriage belongs to the community of spouses.

59. The U.S. Constitution guarantees due process in the 5th and 14th Amendments. U.S. CONST. amend. V, XIV. The 5th Amendment specifically assures that property may be taken

Another example from the U.S. experience is community property. This is a property institution which many West Coast states and Louisiana have borrowed from the European civil law culture.[60] Community property is an institution that deeply affects the marriage relationship. All earnings and resulting property acquired during the marriage vest in the community of spouses.[61] This is radically different from non-community (or "separate") property states, where the earning party owns the earnings and property purchased with the earnings.[62] The majority of states do not have community property. It remains up to each state to decide what form of spousal property rights exist, even though the United States is one nation.[63]

B. Legal Resources

Legal institutions such as courts, law libraries, and legal professions create a large social expense, even for a highly developed economy like that of the United States. The TRIPS requirements of substance and procedure of intellectual property law creates a large demand on legal resources.[64] Intellectual property cases are notoriously expensive in the United States. The American Intellectual Property Law Association reports, based on a survey of its members, that the median cost of patent litigation to each side is $799,000 through the end of discovery, and $1,503,000 through trial and appeal.[65] Often, parties will find that they must give up a good claim of right or a defense and settle a case, due to the expense of the litigation itself.

It is not clear why intellectual property claims should be singled from other matters for mandatory legal procedures as the TRIPS agreement does. Many matters demand attention within a given legal

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by the federal government only for public purposes upon just compensation. U.S. CONST. amend. V.

60. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (3rd ed., 1993) (for a good history on property law).

61. *See* BLACK'S LAW DICTIONARY (6th ed. 1990).

62. The title vests in the community. However, the effect is much like creating a kind of joint title on behalf of both spouses. *See* Dukeminier, *supra* note 60.

63. States having community property include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. The West Coast states form a nearly solid block, but one can note that Oregon, a Pacific Coast state has opted not to have community property. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES, (6th ed., 2000).

64. *See generally* TRIPS, *supra* note 25.

65. Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1502 (2001).

order: divorces, domestic property disputes, claims of loss or injury to person or property, crimes, environmental protection, reduction of domestic violence, to name a few. It would seem that a nation itself should determine the priorities within a legal system, unless some established international human rights or other compelling legal norm intervenes. Are intellectual property rights among the compelling legal norms? If so, why?

C. Innovation and Free Trade

Trade should not be an end in itself. Trade is a means for delivering needed or desired goods and services. Innovation constitutes a means of providing people with things that satisfy their needs and wants. Innovation occurs without any special laws to assist it. The progress of science and engineering before recent centuries took place without patent and copyright laws to guide or channel ownership claims. Even pioneering discoveries in the twentieth century were made without an eye to whether the subject at hand would be patentable. Einstein did not consult with patent attorneys prior to developing his theories.

Intellectual property rights do provide incentive for innovators to devote effort and capital to solving problems. The incentive function is one of the primary reasons for creating intellectual property rights. Freedom to engage in trade and incentives for innovation have a strong historical link in intellectual property law: Intellectual property rights, such as patents, have become permissible legal monopolies because they encourage innovation.

It is one thing to assert that intellectual property rights are permissible. It is quite another to make such monopolies mandatory, as TRIPS does.[66] If a national government creates intellectual property rights, it will be responsible to its people. The WTO is not responsible to any citizen, per se. The trade representatives who negotiate the trade related treaties are not elected by constituents; they are appointed by the current political administration. Such an organization has very little ability or incentive to assess the innovation needs of constituent nations.

Intellectual property rights can play a role in stimulating economic development and innovation, when they are framed based on the actual innovative needs of the communities that they serve. Intellectual property rights can also frustrate innovation. For

66. *See* TRIPS, *supra* note 25, at Part III.

example, a large semiconductor-chip-producing corporation can use a patent portfolio to block the development of a pioneering new semiconductor technology. Suppose a newcomer to the semiconductor industry has developed a revolutionary chip that can operate in three states. Rather than being limited to either/or operations, the new chip can process "maybe" states. The newcomer, however, will face the fact that many relatively minor yet customary devices and processes make up the basic structure of the chip. A number of these may be covered by patents held by the large semiconductor producer. That large producer may assert its monopoly power through court processes to block development of the new chip, or may decide to charge excessive license royalties.[67]

In general, a legal order should assure that intellectual property rights are fully balanced by access rights. Since intellectual property rights operate as exceptions to freedom to use ideas and engage in productive activity, such rights need to be coupled with adequate legal assurances that others will not be unduly burdened in adapting new discoveries or practicing in their established professions.[68]

Adequate incentives for innovation do not depend on mandatory international intellectual property rules. Traditional intellectual property economics has been satisfied with providing incentives that operate within a country's own national boundaries. The development of intellectual property laws by England and the United States has proceeded based on the assumption that one can provide an incentive by rewarding inventions within one's own borders. Infringing goods may be stopped at the border. The patent, copyright, or trademark holder does not lose any return on its innovative or goods identification within the intellectual property protecting nation so long as infringing goods do not enter that market. Of course, stopping offending goods at a border impedes trade. However, that block is removed when the exporter or the exporter's nation decides that it is too costly to continue to disregard the rules of the market nation involved.

The over-used term "piracy" should be reserved for those instances where an activity violates the laws of the nations having proper jurisdiction over the claim presented. That is, it should not apply to instances where a nation's own laws do not protect

67. *See, e.g.*, Motorola Inc. v. Hitachi Ltd., 14 U.S.P.Q. 2d 1769 (W.D. Tex. 1990).

68. United States law provides for such assurances in, for example, the doctrine of fair use in copyright (17 U.S.C. § 107 (2000)), and the requirement that patents must not preempt customary knowledge and practice (non-obviousness). 35 U.S.C. § 103 (2000).

intellectual property rights by its own laws.[69]

Let us consider the example of the United States. This nation has been a very aggressive promoter of international intellectual property in recent decades. It has pursued this policy to serve its national interests and those of corporate powers.[70] When nations do not follow the same intellectual property rules as the United States they are often accused by the press and the government as engaging in "piracy." However, the United States has not always pursued this policy. "For a century (after 1790), the United States was exceptionally parochial in copyright matters, not only denying protection to the published works of nonresident foreign authors, but actually appearing to encourage piracy."[71] American attitudes and actions began to turn around in the 1830s, but it was not until 1891 that an act of Congress created a degree of international protection. Foreign authors could achieve protection in the United States only if they deposited two copies of their work before the date of publication anywhere, and both copies had to be manufactured in the United States.[72] The United States did not become a member of the Berne Convention until nearly a century later.[73]

One needs to be careful about economic assumptions though. For example, in an examination of the economics of international intellectual property, Professor R. Carl Moy states:

> In essence, because the parties to an international sale of a patented item each belong to a different national economy, their private costs and gains *become social costs and gains for the countries*

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69. *See* ANAWALT & POWERS, *supra* note 3, at §1.03 [17] n.571.

> Thus, the frequent refrain in news media that actions taken in foreign countries 'violate intellectual property rights' must be taken with a grain of salt. If the law of the nation in question does not prohibit the copying, it is not wise to make such an accusation. Such propaganda misleads and tends to poison the atmosphere of discussion. It is far better to create an atmosphere of intelligent interchange and avoid power politics when intellectual property issues are raised internationally. The questions of what should be protected even within the United States are and remain difficult ones to answer. They are vastly more complicated in our world made up of many cultures, with its attendant difficulties of creating equitable distribution of the world resources, including intellectual property. Furthermore, the basic rule is that even treaties do not alter local intellectual property rules, unless enforcement legislation is adopted by the country in question. . . *Id.*

70. *See* Pamela Samuelson, *The U.S. Digital Agenda at WIPO,* 37 VA. J. INT'L L. 369, 372–73 (1997).

71. ANAWALT & POWERS, *supra* note 3, § 1:101 at 1-128 (2001).

72. SHELDON HALPERN, COPYRIGHT LAW: PROTECTION OF ORIGINAL EXPRESSION 323 (Carolina Academic Press 2002).

73. ANAWALT & POWERS, *supra* note 3, at § 1.03.

> *involved.* For example, where a national of the country under consideration holds a foreign patent, the sale of goods under that patent transfers wealth out of the foreign country into the hands of the patent owning *national.* The national's private gain is thus a social gain for the national's own country. (emphasis added)[74]

The direction of the economic transfer noted is not necessarily true. It is true that wealth is transferred whenever a patentee receives a royalty or enjoys an element of control due to the patent. It is also true that such a transfer takes some portion of the wealth from the nation where the royalty is paid. It is not clear where that wealth actually ends up though. For example, a powerful Swedish patent holder may receive a royalty from, say, Denmark or South Africa. That Swede, however, may have moved to Monaco and the wealth may end up there. Or, what is even more problematic, a multinational corporation may enjoy the royalty (or element of control). In that case, its main economic beneficiaries will be major stockholders or corporate managers. These beneficiaries may be resident or otherwise rooted anywhere. Indeed, these beneficiaries may even be located primarily in the nation paying the royalty.

Intellectual property rights constitute a very powerful form of capital. They allow control over important advances in computers, biotechnology, and other areas. They also tend to control the directions that innovation may take, since intellectual property rights holders can use legal processes to interfere with progress made by competitors and even with their ability to do effective research. In the immediate past, one could summarize the international effects of patents as follows:

> Patent systems are large-scale governmental intrusions into the free-market economy. They involve manipulating social costs and benefits to increase the national wealth. Perhaps the most significant cost of such systems is the higher prices imposed on consumers of the patented advance. . .[75]

What is said about governmental intrusion into the market and the impact of higher prices is true, but now one must consider additional consequences beyond higher prices to consumers.[76] Intellectual property rights determine who will enjoy advances.

Intellectual property rights allow control of communication

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74. R. Carl Moy, *The History of the Patent Harmonization Treaty: Economic Self-Interest as an Influence*, 26 J. MARSHALL L. REV. 457, 481 (1993).

75. *Id.* at 473–74.

76. *See id.*

capacities in some instances. For example, if a communication means depends on use of a patented or copyright-protected technology, an intellectual property right holder may enjoin uses of that technology. In effect, the intellectual property right holder may dictate how or whether people will engage in a very fundamental action—communication. Copyright owners can control the flow of valuable types of information and works over the Internet. A holder of rights in a prevalent system of software may often exercise a degree of control that extends far beyond any original monopoly granted by a copyright or patent.

The control offered by intellectual property rights can be exercised without regard to whether the right holder has contributed any significant innovative activity to the intellectual property right. This divorce between ownership and innovative activity occurs in several ways, not the least of which is the simple commercial purchase of innovative technology. In that case, the right holder has simply obtained an existing technology borne of another's sweat and innovative energy. The holder of a very popular copyright or trademark protected technology may in essence exercise either of these intellectual property monopolies without having contributed to the body of innovation. Such an entity may even stifle the entry of new technologies into the market.

The emergence of multinational businesses and the concentration of corporate power constitute an important factor in the potential for use and abuse of intellectual property rights. They have the ability to influence governments and the international negotiations that may lead to such treaties as TRIPS. They can engage in expensive processes, such as litigation or pursuit of patent applications, in a multiplicity of countries.[77] Large intellectual property portfolios give such entities powerful leverage in negotiation of licenses or development agreements. It is a relatively minor expense for a large corporation to pursue a patent application, even when that requires filing fees, attorney's fees, and transactional costs in various foreign countries.

77. Prosecuting a patent application is no minor expense for an individual or small company. Filing even in one's own country requires filing expenses, attorney's fees and the like. When one seeks protection in more than one country, these fees multiply. In addition, one must undergo considerable expense of translations. Multiple nation filings can easily mount into the hundreds of thousands of dollars per patentable invention. *See* ANAWALT & POWERS, *supra* note 3.

IV. DIRECTIONS FOR THE FUTURE

Intellectual property rights can be helpful legal means when they are constrained to serve human and environmental needs. They must not become ends in themselves however. They must not be permitted to distort other essential elements of legal systems. International intellectual property rights must not become mere instruments creating or protecting private rights or capital, but must remain incentives to pursue such things as innovation and brand-name identification.

When seeking harmonization of intellectual property rights, it is important to assure that international rules do not interfere unduly with national legal cultures. Intellectual property rights lack the compelling necessity of human rights covenants or rules on the use of force, causes that might justify setting aside national legal cultures. The WTO/TRIPS approach fails to recognize these higher legal realities. Instead, it imposes mandatory substance and procedure linked to membership in a nearly essential world trade community.[78] Such an approach commends the pace of progress.

The question arises: What should be done for the future of international intellectual property rights? In response to that question, I offer a series of questions aimed toward further analysis and exploration, a set of proposed intellectual property rights guidelines, and a course of action for dealing with the trade/intellectual property rights regime created by WTO/TRIPS.

A. QUESTIONS FOR STUDY AND ANALYSIS

1. Exactly what purposes do international intellectual property rights serve? To what degree are they necessary for human progress and protection of the planet? Do mandatory international intellectual property rights serve purposes other than commercial advancement?

2. To what degree are international intellectual property rights necessary? Do they rank with such things as human rights or control of military force?

78. *See generally* TRIPS, *supra* note 25.

3. To what extent do national and international intellectual property rights protect mere ownership, as opposed to providing incentives for achieving such goals as valuable innovation? Is it appropriate to encourage intellectual property rights to coalesce into a form of capital?

4. What property institutions serve well in the intellectual property rights arena? Should inventive processes be viewed solely as "private property rights," or should they also include such forms of property as community property and public property?

5. To what extent do given intellectual property rights provide incentives for innovation? To what extent do they interfere with innovation? Under what circumstances do intellectual property rights become abused?

6. Should international intellectual property rights be accompanied by international rights of access to intellectual property? For example, should harmonized patent and copyright norms include such access rights as reasonable non-selective licensing requirements or fair use rights?

7. Is it advisable to link intellectual property right requirements to membership in international communities, such as trade organizations? If so, exactly why?

B. Proposed Intellectual Property Guidelines

Both national and international intellectual property regimes should be guided by useful principles, rather than being adopted at the behest of interest groups unguided by principles. The following are some proposed guidelines.[79]

79. These proposed guidelines find support in the development of intellectual property laws; they should be subjected to study and critique along with the proposed questions for further study. *See* Howard C. Anawalt, *Control of Inventions in a Networked World*, 15 SANTA CLARA COMPUTER & HIGH TECH. L. J. 123 (1999), and 8 INFO AND COMM. TECH. L. J. 121

Guideline 1: The community of nations should insist that international agreements on intellectual property do not interfere unduly with the flourishing of national legal cultures;

Guideline 2: International agreements on intellectual property should not be linked to trade and taxation policies;

Guideline 3: Intellectual property laws should be limited to providing incentives for innovation and appropriate protection of brand identification;

Guideline 4: Intellectual property incentives should be based on reasonable compensation to actual inventors, rather than on agglomerating property rights to the intellectual property owner. The sale or transfer of intellectual property rights from the actual inventor or author to other owners should be tailored (when possible) to assure, that the transferee will not enjoy compensation in any form beyond the fair value of the original innovation in the hands of its creator; and

Guideline 5: In general, intellectual property laws should observe the following pattern of norms: protection should be for limited purposes only, access rights (to technology) should be preferred, functional works (as distinct from expressive ones) should enjoy shorter duration of monopoly coupled with assured monetary compensation.

C. *Dealing with WTO/TRIPS*

The WTO is firmly ingrained in the international legal system. The WTO and its predecessor GATT have been part of the world order for a little more that a half a century and have become established economic institutions.[80] However, the linking of trade and tariff policies to intellectual property right requirements constitutes a departure from the history of international intellectual property, as reflected in earlier treaty arrangements. The TRIPS requirements

(1999).

80. *See* WTO Agreement, *supra* note 25.

appear to interfere unduly with national legal cultures.

One immediate approach to TRIPS is to seek interpretations that ameliorate its interference with national legal cultures. The enforceable text of TRIPS requires that "[m]embers shall give effect to the provisions of the Agreement."[81] Nevertheless, the TRIPS agreement offers some avenues for interpretation. The TRIPS Preamble states that its intentions are "to reduce distortions" in international trade and "to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.[82] Legitimate trade should not embrace trade which gives undeserved economic power to corporate owners (not innovators) or which frustrates the effective development of national legal systems by commandeering courts. The Preamble also recognizes that "the least developed" countries need greater flexibility "in the implementation of laws and regulations in order to enable them to create a sound and viable technological base."[83]

Article 8 provides that nations may adopt measures "necessary to protect public health and nutrition, and to promote public interest in sectors of vital importance to their socio-economic and technological development."[84] Nations, whether industrialized or not, can surely present cogent explanations of why overly demanding substantive or procedural rules concerning intellectual property rights should give way to other national legal needs. The orderly development of a culture under its version of the rule of law surely qualifies as a "sector of vital importance."[85] Article 8 also provides that members adopt measures needed to "prevent the abuse of intellectual property rights by right holders. . ."[86]

More ambitious approaches involve dealing directly with the linkage of trade and intellectual property mandates in the WTO/TRIPS treaty. The linkage of WTO membership to mandatory intellectual property rights and procedure should be ended, if that is politically feasible. If that can not be accomplished, then over time the nature of the linkage between trade membership and protection of intellectual property should be modified. The TRIPS agreement should be amended to require, with modest exceptions, only national

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81. TRIPS, *supra* note 25, at pmbl.

82. *Id.*

83. *Id.*

84. *Id.* at art. 8(1). Article 8 also provides that members adopt measures needed to "prevent the abuse of intellectual property rights by right holders. . ." *Id.* at art. 8(2).

85. *Id.* at art. 8(1).

86. *Id.* at art. 8(2).

reciprocity on the substance of intellectual property protection. In general, the TRIPS agreement should be amended to eliminate required procedures for enforcement, again, with some exceptions.

Substantial change of WTO/TRIPS will require patience and long term effort. However, all nations should study this matter conscientiously and afresh. This certainly includes those powerful and industrially developed nations that have so far promoted TRIPS. The suggestion that TRIPS be changed to revert to less onerous requirements is not, however, revolutionary or radical. To the contrary, it represents a return to the long history of intellectual property rights development on the international scene. TRIPS itself represents the radical departure.

V. CONCLUSION

International intellectual property rights will undoubtedly play a growing role in the world economy, having major effects on innovation and progress. These rules can play a very positive role, but to do so, the nations must place intellectual property and its legal control mechanisms in proper perspective. The obligatory intellectual property norms of WTO/TRIPS represent a departure from the history of international intellectual property and places an undue burden on national legal cultures. TRIPS takes economic policy to be the major, if not sole, determinant of how much of national legal policy and resource must be devoted to protecting intellectual property rights.

The future of useful international intellectual property rights lies in placing those rights in proper perspective. That perspective can best be achieved by carefully analyzing essential policy questions, pursuing future treaties through application of sound general principles, and taking immediate steps to ameliorate any undue interference with national legal cultures by the WTO/TRIPS agreement. With these measures in mind, the future of harmonization will indeed be set to lead to positive results.